12-0901-11125-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE STATE BOARD OF CHIROPRACTIC EXAMINERS

In the Matter of the Chiropractic License of Gregory C. Fors, D.C.; License No. 1836

RECOMMENDATION THAT THE COMPLAINT PANEL'S MOTION FOR SUMMARY DISPOSITION BE GRANTED AND ORDER DENYING RESPONDENT'S MOTION FOR INDEFINITE CONTINUANCE

The above-entitled matter is before Administrative Law Judge Steve M. Mihalchick upon motion of the Complaint Panel of the State Board of Chiropractic Examiners (Complaint Panel) for summary disposition and upon Respondent Gregory C. Fors, D.C.'s Motion for Abeyance, which the Administrative Law Judge has treated as a motion for indefinite continuance. Arguments on the motions were held by telephone conference on May 28, 1997.

Todd A. Crabtree, Crabtree Law Firm, P.A., 2230 North Albert Street, Roseville, Minnesota 55113, appeared on behalf of Respondent. Thomas C. Vasaly, Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, Minnesota 55103, appeared on behalf of the Complaint Panel.

Based upon the record herein and for the reasons set forth in the following Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the State Board of Chiropractic Examiners:

Grant summary disposition in favor of the Complaint Panel finding that Respondent committed the acts alleged in the Notice of and Order for Hearing and Supplemental Notice of and Order for Hearing; concluding that such acts constitute unprofessional conduct, specifically, conduct with patients that is sexual or may reasonably be interpreted by the patients as sexual, and verbal behavior that is seductive or sexually demeaning to a patient, in violation of Minn. Stat. § 148.10, subd. 1(11) and (b) (1996); and further concluding that the foregoing conduct and violations constitute grounds justifying disciplinary action against Respondent.

ORDER

IT IS HEREBY ORDERED that:

1. Respondent's Motion for Abeyance is DENIED.

2. The hearing in this matter is CANCELED.

3. The subpoenas issued in this matter for depositions of the nine patients by Respondent are QUASHED.

Dated this 30th day of May 1997.

STEVE M. MIHALCHICK
Administrative Law Judge

NOTICE

Notice is hereby given that, under Minn. Stat. § 14.61, the final decision of the Board as to the Recommendations made above shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Board. Exceptions to this Report, if any, shall be filed with the Board at 2829 University Avenue S.E., Suite 300, Minneapolis, Minnesota 55414. Under Minn. Stat. § 214.10, subd. 2, a board member who was consulted during the course of an investigation may participate at the hearing, but may not vote on any matter pertaining to the case.

MEMORANDUM

Procedural Background

On May 5, 1997, the Board temporarily suspended Respondent's license to practice chiropractic in the state of Minnesota under the provisions of Minn. Stat. § 148.10, subd. 4. At that point in time, the Board had received complaints from nine female patients of Respondent that he had engaged in sexual conduct with them and had investigated those complaints.

Respondent received the Notice of Temporary Suspension Order on May 9, 1997. Under Minn. Stat. § 148.10, subd. 4, the Board may temporarily suspend a license for not more than 60 days and at the time the Board issues the suspension notice, it must schedule a disciplinary hearing. The Board issued its Notice of and Order for Hearing on May 8, 1997, which contained allegations regarding Respondent's conduct with and toward patients 1 through 8. On May 19, 1997, the Board issued a Supplemental Notice of and Order for Hearing adding similar allegations regarding patient 9.

Four of the nine patients have filed civil actions against Respondent regarding his sexual conduct toward them, and those matters are pending. On May 1, 1997, Respondent was served with a search warrant by a County Sheriff and the Minnesota Bureau of Criminal Apprehension and patient records regarding some or all of the nine patients were confiscated. At this point in time, no criminal charges have been filed against Respondent regarding any of the conduct toward the nine patients. Due to the possibility of criminal charges, and based upon advice of his counsel, Respondent has asserted his privilege against self-incrimination and refused to answer substantive questions posed to him by the Complaint Panel in a deposition on May 19, 1997, and in written requests for admission.

On May 23, 1997, the Complaint Panel served and filed a Notice of Motion and Motion for Summary Disposition. The Motion was supported by a Memorandum of Law, three Affidavits of the investigator who investigated the matter and interviewed the nine patients, sworn complaint forms from seven of the patients, an unsworn complaint form from another of the patients, a sworn affidavit from the remaining patient, a copy of Respondent's Answers to Interrogatories, and Respondent's Response to Request for Admissions in this matter. On May 27, 1997, Respondent served and filed a Request for Hearing on the Motion for Summary Disposition, a Memorandum in Opposition to the Motion for Summary Disposition (without any supporting Affidavits or other evidence) a Notice of Motion and Motion for Abeyance and Memorandum in support thereof. Argument on the Motions was heard by telephone conference on May 28, 1997.

Summary Disposition

Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law. ***Sauter v. Sauter***, 70 N.W.2d 351, 353 (Minn. 1955); Minn. R. 1400.5500 K; Minn.R.Civ.P. 56.03. The Office of Administrative Hearings follows the summary judgment standards developed in the courts when considering motions for summary disposition regarding contested case matters. See, Minn. R. 1400.6600. A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case. ***Illinois Farmers Insurance Co. v. Tapemark Co***., 273 N.W.2d 630, 634 (Minn. 1978); ***Highland Chateau v. Minnesota Department of Public Welfare***, 356 N.W.2d 804, 808 (Minn. App. 1984).

The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact. To successfully resist a motion for summary judgment, the non-moving party must show that there are specific facts in dispute which have a bearing on the outcome of the case. ***Thiele v. Stitch***, 425 N.W.2d 580, 583 (Minn. 1988); ***Hunt v. IBM Mid America Employees Federal***, 384 N.W.2d 853, 855 (Minn. 1986). The existence of a genuine issue of material fact must be established by the nonmoving party by substantial evidence; general averments are not enough to meet the nonmoving party's burden under Minn. R. Civ. P. 56.05. ***Id***.; ***Murphy v. Country House, Inc***., 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (Minn. 1976);

Carlisle v. City of Minneapolis, 437 N.W.2d 712, 75 (Minn. App. 1988). The evidence presented to defeat a summary judgment motion, however, need not be in a form that would be admissible at trial. ***Carlisle***, 437 N.W.2d at 715 (citing, ***Celotex Corp. v. Catrett***, 477 U.S. 317, 324 (1986)).

When considering a motion for summary judgment, the facts must be viewed in the light most favorable to the non-moving party. ***Ostendorf v. Kenyon***, 347 N.W.2d 834 (Minn. App. 1984). All doubts and factual inferences must be resolved against the moving party. See, e.g., ***Celotex***, 477 U.S. at 325; ***Thiele v. Stich***, 425 N.W.2d 580, 583 (Minn. 1988); ***Greaton v. Enich***, 185 N.W.2d 876, 878 (Minn. 1971); ***Thompson v. Campbell***, 845 F. Supp. 665, 672 (D. Minn. 1994). If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted. ***Anderson v. Liberty Lobby, Inc***., 477 U.S. 242, 250-51 (1986).

Respondent argues that summary disposition should not be granted because he has not had an opportunity to complete discovery. Moreover, he argues that as a result of the threat of criminal charges, he has been compelled to plead the Fifth Amendment and that when those charges subside, he would be able to give a full defense. The only discovery that Respondent intended to do was to take the depositions of the nine patients on June 2-4, 1997.

With regard to Respondent's argument that he should be allowed to complete discovery, it is true that the party opposing a motion for summary disposition must be allowed sufficient discovery to properly respond. But in this case, Respondent has brought forth no evidence of his own, no denials, no explanations, and no contrary evidence. The only evidence presented contrary to the allegations of any of the patients were contained in Respondent's answers to interrogatories in one of the civil suits which was submitted by the Complaint Panel. The statement of facts below regarding that particular patient are based on those answers and taken in the light most favorable to him. Respondent has had an opportunity to produce an affidavit from his own knowledge regarding the other allegations and has not done so. Depositions of the opposing party's witnesses may expose some defects in their testimony, but while such examination might weaken the allegations, it clearly would not eliminate the majority of them. The failure of Respondent to produce some affirmative evidence of his own contrary to the allegations of the nine patients is not the result of not yet deposing the nine patients.

Respondent's Requests for Delay

Respondent's argument that he has been compelled to plead the Fifth Amendment and would be able to give a full defense when the threat of a criminal proceeding subsides is similar to his argument that the matter should be held in abeyance pending resolution of the potential criminal matter. It should first be noted that no criminal charges have been filed and there is no criminal action pending. The fact that a search warrant was executed by criminal investigators on May 1, 1997, certainly demonstrates, however, that a criminal investigation is proceeding.

The Complaint Panel opposes the continuance for three reasons: (1) There is no constitutional requirement to grant the continuance, (2) Respondent initially refused to agree to a short continuance, thereby forcing the Attorney General's Office to commit its resources to preparation of the motion and for the hearing in this matter, and (3) An indefinite continuance could result in a delay of more than a year.

It has been noted that courts routinely grant protective orders or stay discovery in civil actions pending the resolution of any criminal actions against a party invoking the privilege against self-incrimination. ***Jones v. B.C. Christopher & Company***, 466 F.Supp. 213, 224 (D.Kansas 1979). However, that common practice does not apply where the person asserting the privilege is the plaintiff in the civil action or a corporation. Moreover, as the Complaint Panel points out, it was held in ***Arthurs v. Stern***, 560 F.2d 477, 480 (1st Cir. 1977) that the strong public interest in promptly disciplining errant physicians indicates that a licensing board is not constitutionally required to stay its proceedings until related criminal prosecutions are over. That holding applies in this case. By operation of statute, the temporary suspension of Respondent's license will terminate after 60 days. Under the facts of this case, it is entirely appropriate that the Board act to ensure that appropriate permanent disciplinary action is taken prior to that time in order to protect the public. Moreover, the Administrative Law Judge agrees with Complaint Panel that an indefinite continuance awaiting the resolution of the criminal matter or some nebulous time at which Respondent "feels comfortable in proceeding" with this matter could result in a delay of years. Respondent's request to delay this matter, both to conduct the depositions of the nine patients and to hold the matter in abeyance while the criminal investigation proceeds, must be denied.

Respondent's Conduct

Because the evidence presented by the investigator and the patients in their statements and affidavits is undisputed by Respondent, the following appear to be the facts in this case for the purposes of the Motion for Summary Disposition:

1. Respondent graduated from the Northwestern College of Chiropractic in 1982 and has been licensed to practice chiropractic in Minnesota by the Board since that time. He is a 45 year-old male and has

practiced since at least 1989 in Bemidji, Minnesota, operating a clinic called Northstar Wellness Clinic.

2. From 1989 to 1996, Respondent engaged in sexual conduct with female patients and patient-employees that was sexual or could reasonably be interpreted by the patients as sexual, and in verbal behavior that was seductive. The conduct included kissing, the touching of patients' breasts, sexual intercourse, and oral sex. Some of the conduct occurred in Respondent's clinic treatment room and in the basement of the clinic.

3. Respondent began providing chiropractic care to patient 1 in April 1990. Patient 1 told Respondent that she was experiencing depression because of stress in her life. Beginning in July 1994, while Respondent continued to provide chiropractic care, Respondent and patient 1 engaged in a sexual relationship. In August 1994, patient 1 began working for Respondent in his chiropractic office. While patient 1 was in his employ, Respondent continued to provide chiropractic care to her and continued his sexual relationship with her. Respondent and patient 1 terminated their sexual, employment, and doctor-patient relationships in December 1996.

4. In January 1995, patient 2 commenced working for Respondent in his chiropractic office. While patient 2 was in his employ, Respondent provided chiropractic care to her. On several occasions, Respondent's comments and behavior to patient 2 were inappropriate. For example, in March or April 1995, patient 2 told Respondent that she was concerned about a change in her right breast. Respondent, without asking whether he could perform a breast exam and without asking the specific area of her breast she was concerned about, performed examinations of both breasts. Respondent told patient 2 that he did not think there was anything to worry about, although if she wanted she could have someone check it out. In May 1995, patient 2 terminated her employment with Respondent.

5. Respondent began providing chiropractic care to patient 3 in September 1995. During an appointment in approximately October 1995, while patient 3 was lying on her stomach on the chiropractic table with her ankles strapped to the table, Respondent spread the table apart so that her legs were separated, stepped between her legs, lowered her pants and underpants, and massaged her buttocks. Patient 3 discontinued treatment after September 1996.

6. Respondent began treating patient 4 in 1995. During one appointment, while patient 4 was on her stomach on the treatment table, Respondent without explanation placed one of his knees over her onto the

other side of the table so that he was straddling her. Respondent then slid his hands under patient 4's shirt and massaged her back.

7. Respondent began providing chiropractic care to patient 5 in approximately the spring of 1996. Thereafter, patient 5 began volunteering in Respondent's chiropractic office in exchange for free chiropractic treatment. Respondent and patient 5 engaged in a sexual relationship from approximately November to December 1996, when they terminated their relationship.

8. Respondent began treating patient 6 in September 1989. They began a sexual relationship in March 1990. In November 1990, Respondent employed patient 6 in his chiropractic office. During patient 6's employment, Respondent continued to treat her and continued his sexual relationship with her. On numerous occasions, Respondent and patient 6 engaged in sex in Respondent's chiropractic office. Respondent and patient 6 terminated their sexual relationship in June 1994.

9. Respondent treated patient 7 beginning approximately 1991. Several months after he began treating her, Respondent began making seductive remarks, e.g., that if he was younger, he would go out with her.

10. Respondent began treating patient 8 in 1995. Respondent and patient 8 engaged in a sexual relationship from approximately the fall of 1995 until the early spring of 1996. On most occasions, the sexual contact occurred in Respondent's office, sometimes during treatment sessions.

11. Patient 9 received chiropractic care from Respondent for a period in approximately 1989 and again beginning in approximately 1992. During an appointment in approximately 1993, patient 9 complained of neck and back pain. Respondent instructed her to remove her shirt and bra, explaining that the weight of her breasts may be contributing to her pain and that he wanted to examine them. Patient 9 complied. Respondent placed his hands on patient 9's breasts, lifting them up and down for approximately 10 seconds. Respondent then told her that she needed a good support bra. Respondent's conduct was sexual and was reasonably interpreted by patient 9 as sexual. Thereafter, patient 9 did not return to Respondent for any additional treatment.

Unprofessional Conduct

Minn. Stat. § 148.10, subd. 1, states that the Board may take disciplinary action against the license to practice chiropractic of a person for unprofessional conduct, among other reasons. The statute goes on to state, in pertinent part:

> For the purposes of clause (11), unprofessional conduct means any unethical, deceptive or deleterious conduct or practice harmful to the public, any departure from or the failure to conform to the minimal standards of acceptable chiropractic practice, or a willful or careless disregard for the health, welfare or safety of patients, in any of which cases proof of actual injury need not be established. Unprofessional conduct shall include, but not be limited to, the following acts of a chiropractor:
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> . . .
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> (b) Engaging in conduct with a patient that is sexual or may reasonably be interpreted by the patient as sexual, or in any verbal behavior that is seductive or sexually demeaning to a patient; . . .

Respondent's conduct described above falls squarely within that described in clause (b). It therefore constitutes unprofessional conduct and is grounds for disciplinary action against Respondent's license. Respondent's conduct is so egregious and repeated that his continued practice clearly constitutes a threat of imminent harm to the public.

S.M.M.